STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2005
v	No. 251009 Wayne Circuit Court
MOLIFA DRAMMEH, Defendant-Appellant.	LC No. 03-001812-01

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of embezzlement by agent of more than $1,000 but less than $20,000, MCL 750.174(4)(a). The trial court sentenced him to two years' probation and payment of restitution.[1] We affirm.

I. Facts

At trial, Phid Onwuzurike testified that he is the owner of a gas station in Detroit (Tr I, pp 8-9). Defendant began working at the gas station in approximately September 2001 as a cashier. In October 2001, Onwuzurike hired Haronah Drammeh[2] as an assistant manager (Tr I, pp 11-12). There are two safes at the gas station, only Onwuzurike and Drammeh had access to them (Tr I, p 16). On December 2, 2001, Drammeh was scheduled to work. Defendant was scheduled to work from 2:45 p.m. to 11:15 p.m. (Tr I, pp 24-25). A man named Paul was supposed to work from then until the next morning at 7:00 (Tr I, p 32). When Onwuzurike called the station at 11:15 a.m. on December 2, 2001, defendant answered the phone stating that he arrived early due to the bus times on Sundays (Tr I, p 26). When Onwuzurike asked to speak to Drammeh, defendant responded that Drammeh could not come to the phone because he was in the cooler (Tr I, p 27). A couple of hours later, Drammeh called from his cellular telephone to Onwuzurike (Tr I, pp 29-30). Drammeh told Onwuzurike that he was still in the cooler (Tr I, p 30). At approximately midnight, defendant left work and Paul took over the shift (Tr I, p 33).

[1] The order of probation indicates: "Pay restitution – amount to be determined[.]"

[2] Defendant testified that Drammeh is not his relative, but was known to him (Tr IV, pp 14-15, 17).

On Monday morning, when Onwuzurike arrived at the gas station, he noticed a bag of nickels in front of the office safe on the floor. He opened the safe to get the Friday and Saturday deposits (Tr I, pp 36-39). But he found nothing there (Tr I, p 39). When he checked the safe in the cashier's cage, he found a grocery bag filled with empty money envelopes (Tr I, pp 40-41). He also found a red envelope with money in it. The red envelope represented the money deposited from Paul's midnight shift. (Tr I, p 41). Based on the paperwork from defendant's afternoon shift, which defendant filled out, defendant should have dropped $2,116.78 into the safe (Tr I, pp 42-50).

Onwuzurike called Drammeh's cellular telephone and home telephone, but got no answer (Tr I, pp 50-51). He then called Drammeh's wife who told him that Drammeh left the house at 5:00 a.m. that morning stating that there was an emergency at the gas station (Tr I, pp 51-52). Onwuzurike called defendant around noon. Onwuzurike asked defendant when Drammeh left the day before and whether he took anything with him. (Tr I, p 54.) Defendant answered that he was busy and did not pay attention to what Drammeh took with him (Tr I, p 54).

Defendant worked Monday night to Tuesday morning (Tr I, p 58). Drammeh did not arrive at work on Tuesday as scheduled (Tr I, p 58). Defendant told Onwuzurike that he made the appropriate drops on Sunday (Tr I, p 59). He also told Onwuzurike that Drammeh was supposed to pick him up from work on Sunday night, but he did not (Tr I, p 59).

On Wednesday, Onwuzurike called defendant and asked him to stay at the station until he got there. But defendant left to catch his bus. Onwuzurike drove to the bus station to further question defendants about his drops. (Tr I, pp 61-62.) Defendant again stated that he made all the drops and that Paul should be questioned (Tr I, p 62). Defendant then gave Onwuzurike directions to Drammeh's house (Tr I, p 64). At the house, Drammeh's wife greeted them (Tr I, p 65). She said she did not know where Drammeh was (Tr I, p 66) but she let Onwuzurike and defendant look around (Tr I, p 67). After leaving Drammeh's house, Onwuzurike called the police (Tr I, p 70).

Onwuzurike maintained defendant as an employee but took away his monetary duties (Tr I, p 71). At some point, defendant reported to Onwuzurike that he heard that Drammeh was in Germany (Tr I, p 72). Onwuzurike ultimately discovered that on December 2, 2001, at 9:15 a.m., a Western Union transfer was made from the gas station of $35,000 to Gambia (Tr I, pp 72-73). It was later discovered that several such transfers had been made to Gambia, defendant's country of origin (Tr I, p 73).

With regard to the videotapes that show the register area and the cage area where the money is counted (Tr I, p 108), Onwuzurike testified that he viewed the tapes, but did not turn them over to the police department (Tr I, p 109). Onwuzurike asked a technician to retrieve recordings of certain times and days (Tr II, p 21). But the technician could only retrieve the first two hours of the tape of defendant's shift on Sunday December 2, 2001 (Tr II, pp 22). On the second day of trial, Onwuzurike stated that he had the tape (Tr II, p 25).

Onwuzurike testified, "I feel that [defendant] was a part of the whole process and the long deceit that went along with it." (Tr I, p 116). Onwuzurike also admitted that it was possible that Drammeh had made the Western Union transfers (Tr II, p 29). He also admitted that only the assistant manager has access to the cartons of cigarettes and the "phone cards" (Tr II, p 29).

Cashiers do not have access to these things (Tr II, p 30). The total amount of cash missing was $34,459.41. "About the time" defendant arrived on duty, a total amount of $2,300 was wired by Western Union to Gambia and $200 was wired to Germany. The total amount wired was $4,384.62. Approximately $2,000 worth of cigarettes was also missing along with approximately $2,670 worth of "phone cards." (Tr II, pp 18-20).

Defense counsel moved for directed verdict arguing that there was no evidence that defendant took money from the safe, rather, the evidence showed that he did not have access to the safe (Tr III, pp 3-4). The prosecution argued that it could be inferred from the evidence that defendant never made the drops from his shift because the money from defendant's shift was not found in the safe (Tr II, p 8). The trial court denied the motion (Tr II, p 9).

Defendant testified that on December 2, 2001, Drammeh called him and asked him to come to work early (Tr III, p 21). After defendant took over the shift, Drammeh went into the office and then to the coolers (Tr III, p 23). Defendant testified that when Onwuzurike called, defendant told Drammeh that Onwuzurike was on the line and then went back to his cashier duties (Tr III, p 24). He assumed that Drammeh answered the phone (Tr III, p 24). At the end of his shift, defendant filled out his paperwork required. The sheet that was produced at trial was the one he filled out (Tr III, pp 25-26). But there were some check marks and corrections as to amounts that defendant did not make (Tr III, p 27). The additional writing was in Onwuzurike's handwriting (Tr III, p 29). After defendant's shift on December 2, 2001, Drammeh was supposed to give him a ride home, but when defendant called Drammeh, the phone was switched off (Tr III, p 32). Paul gave defendant money to catch a bus (Tr III, p 32).

Defendant testified that on December 3, 2001, when Onwuzurike came in, he opened the cashier's safe and pulled out blue envelopes with money from defendant's shift and red envelopes with money from Paul's shift (Tr III, pp 34-35). After Onwuzurike went into the office for approximately thirty minutes, he returned and asked defendant questions about Drammeh. Then defendant and Onwuzurike watched the video from the day before. (Tr III, p 35-39). The video showed that defendant made the drops (Tr III, p 40). On December 3, 2001, defendant took Onwuzurike to Drammeh's house (Tr III, p 43). Onwuzurike told defendant that Drammeh had taken money from the office safe and had made Western Union transfers (Tr III, pp 44-45).

On Thursday December 6, 2001, Onwuzurike called defendant and said he wanted to meet him in an isolated place (Tr III, pp 49-51). So defendant went to the bus stop and Onwuzurike met him there (Tr III, p 51). At that time, Onwuzurike told defendant that Drammeh took approximately $18,000 (Tr III, p 52). For the first time, he indicated that defendant too had failed to make his drops (Tr III, p 52). Defendant remained employed by the gas station until December 27, 2001 (Tr III, p 52). Defendant testified that Onwuzurike threatened him when he said he could not locate Drammeh (Tr III, p 56). On cross-examination, defendant testified that the Western Union machine is located in the cashier's cage that he has access to, but he did not make the transfers (Tr III, pp 73-74).

Onwuzurike further testified that a check that he cashed at the station for $2,239.82 on Saturday December 1, 2001 (Tr III, p 84) was also missing from the station (Tr III, p 85). Later, Onwuzurike obtained a copy of the cancelled check, which indicated that it was cashed by a hair-braiding salon, which is "supposedly" owned by Drammeh and his wife (Tr III, pp 85-87).

In extensive findings of fact, the trial court essentially found that only defendant had access to the money that came into the gas station during his December 2, 2001, shift. Therefore, if it was missing, defendant either took it or assisted Drammeh in taking it. The trial court found defendant guilty as charged of embezzlement.

II. Effective Assistance of Counsel

Defendant first argues that he was denied the effective assistance of counsel because defense counsel failed to introduce a videotape that recorded defendant's December 2, 2001, cashier shift at the gas station and failed to introduce the testimony of two witnesses who saw Onwuzurike remove the money defendant dropped into the safe in the cashier's cage.

Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

In *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001), our Supreme Court, addressed the basic principles involved in a claim of ineffective assistance of counsel, stating:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that, "with the video showing that the defendant made the required drops, it demonstrates that Mr. Onwuzurike is lying when he said that there were not blue envelopes in the safe and it bolsters the credibility of the defendant because it is proof that his testimony is credibility [sic] and truthful." But this argument is faulty for two reasons. First, Onwuzurike's testimony with regard to the blue envelopes for defendant's shift was inconsistent. He testified that inside the safe in the cashier's cage there were "empty money envelopes" of "mixed colors" including blue. There was also a red envelope with money in it. (Tr I, p 41). But, he was also asked, "Now, Defendant's blue afternoon shift money envelopes, were any of those in the safe?" To which Onwuzurike responded, "No." Therefore, it is unclear whether

Onwuzurike testified that empty blue envelopes were found in the safe or there were no blue envelopes in the safe. Second, it is not clear that the available videotape would show that defendant "made the required drops." Although there was testimony, by defendant, that he and Onwuzurike watched the videotape that showed all of defendant's shift including his drops, Onwuzurike testified that the video technician was only able to retrieve two hours of defendant's shift from the videotape. Therefore, on this record, it is not clear that the available videotape would have shown any drops for defendant's December 2, 2001, shift.[3]

Further, the trial court stated that taking the other testimony into consideration, the missing video was a "nonissue." The trial court stated:

> The Defendant then said suggests [sic] checking the video and that in fact they did check the video together and that the video confirms that the Defendant dropped the money into the safe. The video really comes to be – it would be nice to have it. It really becomes a nonissue for the Court for this reason. If in fact there had been no envelopes found in the safe that was in the cashier's cage, then if the video showed the Defendant dropping envelopes into the safe, that would be one thing, but the testimony was that there were empty envelopes found and any employee of, this Court finds, that new [sic] about the video tapes would certainly make sure that there were drops being made. The video tape would not necessarily show whether those envelopes were empty or full, depending on how they were dropped. So it really becomes a nonissue for the Court for that reason. In fact, it really shows this Court that someone familiar with the procedure would have been doing the dropping in the first place. [Tr IV, pp 134-135.]

Defendant also argues that defense counsel was ineffective for failing to call witnesses who were present when Onwuzurike opened the safe. But the record does not contain any information about the substance of their testimony or how their testimony would have aided defendant's case. Moreover, decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy, and the failure to call a witness only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Dixon,* 263 Mich App 393, 398; 688 NW2d 308 (2004). In light of the fact that the substance of the potential witnesses' testimony is unknown, this Court cannot conclude that defense counsel's failure to call the witnesses deprived defendant of a substantial defense. Defendant cannot overcome the strong presumption that that defense counsel's decision not to call these witnesses constituted sound trial strategy. Therefore, we conclude that defendant was not denied the effective assistance of counsel.

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[3] Defendant suggests that we remand the case for a *Ginther*[3] hearing to determine the contents of the videotape. But because defendant failed to move for a *Ginther* hearing in the trial court, our review is limited to the existing record. *People v Snider,* 239 Mich App 393, 423; 608 NW2d 502 (2000).

III. Sufficiency of the Evidence/Great Weight of the Evidence

Defendant also argues that the prosecution failed to present sufficient evidence to support his embezzlement conviction or that the verdict was against the great weight of the evidence. We disagree.

This Court reviews de novo challenges to the sufficiency of the evidence. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). When reviewing a sufficiency of the evidence claim in a criminal case, "this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime were proved beyond a reasonable doubt." *People v Moorer*, 262 Mich App 64, 76-77; 683 NW2d 736 (2004). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of a crime." *Id* at 77.

The test for whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

The elements of embezzlement are: (1) the money in question belonged to the principal, (2) defendant had a relationship of trust with the principal as an agent or employee, (3) the money came into defendant's possession due to the relationship of trust, (4) defendant dishonestly converted the money to her own use, (5) the act was without the consent of the principal, and (6) at the time of the conversion, defendant intended to defraud or cheat the principal. *People v Collins*, 239 Mich App 125, 131; 607 NW2d 760 (1999).

The evidence showed that the money in question belonged to Onwuzurike in that it was money paid for purchases made as the gas station that he owned. Defendant, as a cashier hired by Onwuzurike to work at the gas station, held a relationship of trust with Onwuzurike as an employee. The evidence also showed that the money in question came into defendant's possession while he was working at his cashier shift at the gas station. The evidence also showed that Onwuzurike did not consent to having the money taken from the gas station. The last element, however, presents more of an issue.

Defendant argues that the evidence would not allow a reasonable trier of fact to conclude beyond a reasonable doubt that defendant converted the money from his December 2, 2001, shift. The trial court appears not to have found that defendant was responsible in some way for the money or other items missing from the gas station office or the wire transfers (Tr IV, p 141).[4] Therefore, it is only at issue whether the evidence showed that defendant converted the approximately $2,000 from his December 2, 2001, shift. The evidence in this regard was primarily the conflicting testimony of Onwuzurike and defendant. To the extent that the verdict depended on credibility, the standard of review for the sufficiency of evidence is deferential, and

[4] The trial court stated, "It was at least – well, I was using the elements. It was over a thousand dollars because certainly objectively, even the Defendant testified that it was $2,000 that he dropped into the safe." Further, the prosecution's opening statement only indicated that the evidence would show that defendant took the money received during his December 2, 2001, shift (Tr I, pp 4-5).

requires a reviewing court to draw all reasonable inferences and resolve credibility conflicts in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Defendant specifically argues that "it was [Drammeh, not defendant,] also an employee of Mr. Onwuzurike at the time that did all of the stealing." However, the trial court found that, based on the testimony, this conclusion could not be drawn. Onwuzurike testified that he called the station on December 2, 2001, asking for Drammeh and, though defendant said he was there, he did not answer the phone. When Drammeh did return Onwuzurike's call, it was from a cellular telephone, not from a telephone at the gas station. Defendant also testified that once Drammeh left the gas station, he did not return during defendant's shift. Nor is there any evidence that Drammeh returned during Paul's shift. Yet when Onwuzurike arrived at the gas station the next day, the money from only defendant's shift was missing from the safe in the cashier's cage. Money from Paul's shift was present. The evidence showed that no one, other than Onwuzurike and Drammeh, had access to that safe. Based on this evidence, a rational trier of fact could conclude beyond a reasonable doubt that defendant either dropped empty envelopes into the safe or did not drop anything into the safe. Therefore, we conclude that there was sufficient evidence to support defendant's verdict. We also conclude that the verdict was not against the great weight of the evidence because the evidence does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski